

Worksession

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| Agenda Item # | 10 |
| Meeting Date | June 14, 2004 |
| Prepared By | Kenneth Sigman Lonni Moffet, Communications Manager |
| Approved By | Wayne Hobbs, Deputy Mgr. |

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| Discussion Item | Discussion of Resolution authorizing Agreement with MCImetro Access Transmission Services LLC (formerly known as MFS Telecommunications Company) regarding fiber optic cables in the City's rights-of way. |
| Background | The City is renewing an agreement authorizing MCImetro Access to install and maintain fiber optic cables in the City's rights-of-way in exchange for paying a fee of \$2.00 per linear foot of cable and indemnifying the City from liability. The attached agreement has been slightly modified from previous agreements but has been thoroughly reviewed and approved by legal counsel for the City and for MCImetro Access. |
| Policy | This agreement renews the terms of the existing agreement while leaving open the option of enacting a telecommunications ordinance that overrides the agreement in the event that changes to, or clarifications of, federal law clear the way for the City to modify the way the City regulates telecommunication providers using the Rights of Way. |
| Fiscal Impact | Revenue: The interim agreement with MFS requires them to pay the City a fee of \$2.00 per linear foot of cable in the right-of-way totalling \$19,604.00 annually. An annual administrative fee of \$250 is also levied. Expenses: The Interim Agreement requires MFS to reimburse the City for up to \$5,000 in legal expenses related to negotiating these agreements. |
| Attachments | Proposed agreement |
| Recommendation | Consider the proposed agreement. |
| Special Consideration | |

INTERIM AGREEMENT

During such period until the City Council of the City of Takoma Park, Maryland ("City Council") enacts an ordinance governing use of the public rights-of-way by telecommunications providers (a "telecommunications ordinance"), MCImetro Access Transmission Services LLC, successor in interest to Metropolitan Fiber Systems of Baltimore, Inc. ("MCImetro") and the City of Takoma Park ("City") agree that the parties will proceed in accordance with this Interim Agreement between the parties as a legal basis for the City's authorization that telecommunications facilities owned by MCImetro may occupy and use the public rights-of-way in the City under the following terms and conditions:

1. This Interim Agreement shall apply to MCImetro's owned or operated facilities and operations in the public rights-of-way within the City limits until such time as the City Council enacts a telecommunications ordinance or until this Interim Agreement expires by its terms, whichever is earlier. This Interim Agreement shall be effective as of August 1, 2001, and shall expire upon the approval or denial by the City of applications for one or more franchises or licenses submitted by MCImetro pursuant to a telecommunications ordinance and, in any event, not later than July 31, 2007, unless extended by agreement of the parties. For the purposes of this section, "operated facilities" are facilities over whose day-to-day operations MCImetro has control.

2. MCImetro reserves the right to use the services of contractors and subcontractors to do the necessary construction work to emplace MCImetro's facilities in the City's rights-of-way. Contractors and subcontractors so engaged by MCImetro shall act as authorized agents of MCImetro with reference to such work. MCImetro shall be responsible for all acts and omissions of such contractors and subcontractors during the course of their work for MCImetro

as if they were the acts and omissions of MCImetro. MCImetro shall notify the City in writing, in advance, of the identity of any contractors and subcontractors that will be acting as authorized agents of MCImetro.

3. MCImetro shall at all times comply with the City Code and regulations. MCImetro shall file, or cause to be filed, appropriate applications, accompanied by such permit and/or inspection fees as specified in the City Code, with the City Manager or his/her designee for any necessary work permits and inspections for existing facilities. MCImetro shall file or cause to be filed appropriate applications, accompanied by the usual permit and/or inspection fees, with the City Manager or his/her designee for any necessary work permits and inspections for new or additional facilities, which the City will process in normal course. All such permits shall be revocable by the City and are expressly conditioned on MCImetro's compliance with the terms of this Interim Agreement.

4. Within 14 days after receipt of notice of the effective date of a City telecommunications ordinance, MCImetro shall apply for one or more franchises or licenses, as required by and subject to the provisions of the telecommunications ordinance, seeking authorization for MCImetro's facilities to continue occupying and operating in the City's public rights-of-way. This Interim Agreement shall continue in effect until such time as the City acts upon MCImetro's application(s) submitted pursuant to the telecommunications ordinance. However, in no case shall the terms of this Interim Agreement be interpreted to prevent the City from denying any non-complying franchise or license application submitted by MCImetro and terminating this Agreement.

5. This Interim Agreement creates no vested rights in MCImetro or the City, and any emplacement of facilities by MCImetro in the public rights-of-way within the City hereunder is

at MCImetro's risk. None of the provisions of this Interim Agreement shall be deemed to constrain or otherwise to limit or to expand or enlarge the police powers of the City. Nothing in any approval by the City of an authorization of any transfer or assignment of any ownership interest shall be construed to waive or release any rights of the City in and to the streets, public ways, and public places of the City, or as a release of any of the City's police powers, or as an exercise of eminent domain.

6. The right-of-way use fee does not include any permit, inspection or other fees required to be paid pursuant to the City Code and regulations, and such fees shall not be offset against the right-of-way use fee. During the term of this Interim Agreement, the right-of-way use fee will be calculated at \$2 per linear foot per year, payable at the end of each calendar quarter for the quarter then ending, based on the average linear footage in the public rights-of-way during that quarter. Once a telecommunications ordinance is enacted MCImetro shall make payments as required by the telecommunications ordinance and any authorization granted to MCImetro by the City thereunder.

7. The rights and duties under this Interim Agreement are assignable by MCImetro only with the prior written consent of the City, which consent shall not be unreasonably withheld, except where (a) the assignment is to an affiliate or subsidiary of MCImetro; (b) after such assignment, MCImetro continues to exert actual working control over the affairs of the company; and (c) the assignee executes a document accepting the terms of the Interim Agreement. In all cases, this Interim Agreement shall be binding upon the assignee. Any attempted assignment in violation of this provision shall be void.

8. No installation or emplacement of any telecommunications system or facility shall be performed, conducted, or maintained in the City unless plans therefor shall have been first

submitted to the City Manager or his/her designee and the appropriate permits issued as required by the City Code and regulations.

9. MCImetro shall defend, indemnify, protect, and hold harmless the City, its officers, agents, employees, departments, contractors, successors, and assigns from any and all claims, losses, liability, causes of action, demands, judgments, proceedings, and expenses of any nature (including without limitation reasonable attorneys' fees) arising out of, or resulting from, the acts or omission of MCImetro, its officers, agents, employees, contractors, successors, or assigns, acting under the authority granted by this Interim Agreement.

10. MCImetro shall carry worker's compensation insurance with statutory limits and employer's liability insurance with limits of not less than five hundred thousand dollars (\$500,000), which shall cover all operations to be performed for construction, maintenance, and operation of its telecommunications system hereunder.

11. MCImetro shall carry comprehensive general liability insurance, including completed operations, independent contractors, and contractual liability coverage (ISO) with bodily injury limits of not less than five hundred thousand dollars (\$500,000) per person and one million dollars (\$1,000,000) per occurrence which shall cover all operations hereunder. MCImetro shall also carry property damage liability insurance with limits of not less than five hundred thousand dollars (\$500,000); automobile liability insurance covering all vehicles leased or owned by the MCImetro with limits of not less than five hundred thousand dollars (\$500,000) in aggregate; and an excess liability insurance with limits of not less than one million dollars (\$1,000,000).

12. Any insurance provider of MCImetro shall be admitted and authorized to do business in Maryland and shall be rated at least A:VIII in A.M. Best and Company's Insurance

Guide. MCImetro's insurance shall be primary as respects any other valid or collectible insurance that the City may possess, including any self-insured retentions the City may have, and any other insurance the City does possess shall be considered excess insurance only and shall not be required to contribute with this insurance.

13. Prior to the execution of this Interim Agreement, self-insured retentions must be stated on the certificate(s) of insurance, which shall be sent to and approved by the City. "Cross-liability", "severability of interest", or "separation of insureds" clauses shall be made a part of the comprehensive general liability and comprehensive automobile liability policies. MCImetro shall furnish certificates of such insurance to the City on an annual basis. The certificates shall list the City as an additional insured, and shall provide that the insurance shall not be cancelled or materially changed unless thirty (30) days' prior written notice shall be given to the City.

14. The poles, wires, and appurtenances of MCImetro's system shall be located, erected, and maintained upon existing utility facilities wherever reasonable and feasible. MCImetro shall use underground facilities in all cases where all other utilities are required to use underground equipment and where in practice all utilities are undergrounded.

15. All facilities erected by MCImetro within the City shall be so located as to cause minimum interference with the proper use of public rights-of-way and public places and to cause minimum interference with the rights and convenience of adjoining property owners.

16. Prior to the beginning of construction in front of a residence where a metal cover that allows access to MCImetro's underground conduit (a "handhole") is planned to be emplaced, MCImetro shall notify in writing the owner of the residence and the owners of the two residences on either side of the affected residence of MCImetro's intention to construct and emplace a handhole in front of the residence. If the affected owner objects to the planned

location of the handhole, MCImetro shall cause the handhole to be emplaced at another location. If MCImetro cannot reach a resolution with an owner regarding the location of a handhole, the City shall make the decision as to an appropriate location. MCImetro shall execute and shall comply at all times with a Memorandum of Understanding with the City substantially identical with the one executed by Bell Atlantic and PEPCO and incorporated by reference in Resolution No. 1998-43.

17. In case of disturbance or damage to any street, sidewalk, alley, public way, street sign, or other public or private property, MCImetro shall at its own expense promptly and in a manner acceptable to the City or the private property owner, as applicable, replace, repair, and otherwise restore such disturbance or damage. Prior to the beginning of construction at each location, MCImetro shall, at its own expense, videotape the affected construction area and have the videotape available for review by the City in case of any claims that disturbance or damage to property was not properly replaced, repaired or otherwise restored by MCImetro. MCImetro shall repair, within three (3) days of notice from the City, any potholes, cracks or other damage to the City's rights-of-way or to adjoining private property caused as a result of MCImetro's occupation of the rights-of-way.

18. If, at any time while this Interim Agreement is in force, the City shall undertake any public building or construction altering the grade, alignment, or location of any street, sidewalk, alley, or public way, MCImetro promptly shall, upon reasonable written notice from the City, remove and relocate its facilities at MCImetro's expense in a manner reasonably acceptable to the City. The City shall use its best efforts to find MCImetro a suitable relocation for its facilities. If a third party that is authorized to place facilities in the right-of-way requests MCImetro, through the City or directly to MCImetro, to protect, support, temporarily disconnect,

remove or relocate its facilities to accommodate construction, operation, or repair of the third party's facilities, MCImetro shall, after thirty days' advance notice, take action to effect the necessary changes requested. The reasonable cost of such move shall be borne by the party requesting the protection, support, temporary disconnection, removal or relocation and at no charge to the City. In the event of emergency, the City may sever, disrupt, dig up, or otherwise destroy facilities of MCImetro, using its best efforts to notify MCImetro prior to performing such work whenever practicable. Repairs to MCImetro's equipment and facilities required as a result of such an emergency situation shall be done at MCImetro's expense.

19. MCImetro shall at all times employ at least ordinary care and shall install and maintain industry standards and services for preventing failures and accidents which would cause damage, injuries, or nuisance to the public.

20. Prior to the installation or emplacement of any portion of its telecommunications system within the City limits, in addition to obtaining all applicable permits and approvals from the City, MCImetro is responsible for obtaining all applicable permits and approvals from the State of Maryland and any other parties with control of affected portions of the rights-of-way, or whose consent is otherwise required by law.

21. MCImetro shall construct, install, and maintain its telecommunications facilities in a manner consistent with and in compliance with all applicable laws, ordinances, construction standards, and governmental requirements, and with all applicable technical standards established by the Federal Communications Commission or state agencies.

22. MCImetro shall at all times comply with the National Electrical Safety Code (National Institute of Standards and Technology), National Electric Code (National Bureau of Fire Underwriters), applicable federal, state, and local regulations, and other applicable codes

and ordinances of the City.

23. In any event, MCImetro's telecommunications facilities and construction shall not endanger or interfere with the safety of persons or property within the City.

24. Construction, installation, and maintenance of MCImetro's telecommunications system shall be performed in an orderly and workmanlike manner and in close coordination with public and private utilities serving the City, following accepted industry construction procedures and practices and working through any appropriate communities and organizations.

25. All cable and wires shall be installed, where possible, parallel with electric and telephone lines, and multiple aerial cable configurations shall be arranged in parallel and bundled with due respect for engineering and aesthetic considerations.

26. MCImetro shall provide to the City prior to start of any significant construction, reconstruction, repair, replacement, relocation, or maintenance work within the City's public rights-of-way (a "Construction Project") complete plans for such Construction Project for approval by the appropriate City departments. MCImetro must submit updated as-built maps to the City within 30 days of the completion of any such work within the City's public rights-of-way. MCImetro has no current plans for providing service to residents and businesses in the City, and MCImetro will notify the City prior to providing any such service in the City.

27. MCImetro shall arrange with the City to provide, during the period of any Construction Project, police personnel to control traffic and monitor activity in the public rights-of-way. Such service shall be provided at MCImetro's expense, at a rate of \$40 per hour for the first police official and \$35 per hour for each additional police official, including all benefits and FICA.

28. MCImetro shall allow the City to make inspections of any of MCImetro's facilities and equipment within the City at any time upon receiving prior written notice.

29. The refusal, failure, or neglect of MCImetro to meet its obligations under this Interim Agreement shall subject MCImetro to all penalties and remedies, legal or equitable, which are available to the City, including termination of this Agreement and all authorization hereunder to use or occupy the rights-of-way.

30. Prior to commencing any Construction Project within the City, MCImetro shall file with the City Clerk two (2) bonds: the first, in the amount of 20% of the cost to MCImetro of the portion of the project being carried out within the City, will be used to secure the City's recovery of any and all damages, loss, or costs suffered by the City resulting from the failure of MCImetro to satisfactorily complete and maintain its telecommunications system in the City and to secure removal of facilities abandoned in the public rights-of-way by MCImetro and shall be cancelled upon completion of such Construction Project by MCImetro; the second, in the amount of \$10,000, will be used to secure the City's recovery of any and all damages, loss, or costs suffered by the City resulting from damage to or loss of any trees due to MCImetro's construction or occupation of the City's right-of-way and shall be cancelled one (1) year after completion of such Construction Project by MCImetro.

31. In addition to all other rights and powers reserved or pertaining to the City, the City reserves as an additional and as a separate and distinct remedy the right to terminate this Interim Agreement and all rights and privileges of MCImetro hereunder in any of the following events or for any of the following reasons:

- (a) MCImetro fails after thirty (30) days' prior written notice to comply with any of the provisions of this Interim Agreement or has, by act or omission, violated any term or condition; *provided, however*, that such period shall be extended for a period of time as may be reasonably necessary to correct such

non-compliance or violation; or

- (b) MCImetro fails to submit an application for one or more required franchises or licenses within 14 days after receipt of notice of the enactment of a telecommunications ordinance by the City; or
- (c) The City denies the application(s) filed by MCImetro pursuant to a telecommunications ordinance; or
- (d) MCImetro becomes insolvent, unable or unwilling to pay its debts, or is adjudged a bankrupt; or
- (e) The City condemns substantially all of the property of MCImetro within the City by the lawful exercise of eminent domain.

The parties stipulate that this Interim Agreement is, for the purposes of the Bankruptcy Code, executory. MCImetro may terminate this Interim Agreement at any time, without cause, by delivering written notice thereof to the City at least one hundred and eighty (180) days prior to the effective date of such termination.

32. No termination by the City, except for reason of condemnation, shall be effective unless or until the City shall have adopted a resolution setting forth the cause and reason for the revocation and the effective date, which resolution shall not be adopted without reasonable prior notice to MCImetro and an opportunity for MCImetro to be heard on the proposed resolution. If the revocation depends on a finding of fact, such finding of fact as made by the City shall be based on substantial evidence and shall be considered and given due weight in any subsequent judicial action between the parties.

33. Upon the expiration or termination of this Interim Agreement, and subject to any judicial disposition or to any subsequent agreement between the parties, MCImetro shall have the option, without expense to the City and within one year of said termination or expiration, to remove its telecommunications facilities and restore the public rights-of-way to a condition reasonably satisfactory to the City, or to abandon said telecommunications facilities. In the event

MCImetro chooses to abandon the system, the City, after thirty (30) days' prior written notice, (i) shall be allowed to take over in whole or in part said telecommunications facilities in the public rights-of-way, as property of the City, without compensation, and in no event shall MCImetro have any claim for damages against the City on account of the taking over of said telecommunication facilities; (ii) may require MCImetro to remove the abandoned facilities or any part of them at MCImetro's expense; or (iii) the City may remove the abandoned facilities or cause them to be removed and charge MCImetro for the expense of such removal.

34. MCImetro shall reimburse the City at the City's or its agents or counsel's standard rates for all reasonable expenses relating to the preparation, issuance and implementation of this Interim Agreement by the City and its employees, agents, and counsel not to exceed Five Thousand Dollars (\$5,000) in the aggregate; and a \$250.00 annual administrative fee which will not be subject to the \$5,000.00 maximum. Such reimbursement shall be made promptly by MCImetro following receipt of City's invoice enumerating expenses relating to this Interim Agreement as just described.

35. MCImetro shall not be deemed in default of provisions of this Agreement where performance was rendered impossible by way of riots, labor strikes or civil disturbances, floods, or other causes beyond MCImetro's control, and this Agreement shall not be terminated or MCImetro penalized for such noncompliance, provided that MCImetro takes immediate and diligent steps to bring itself back into compliance with the Agreement without unduly endangering the health, safety and integrity of MCImetro's employees or property, or the health, safety and integrity of the public, public rights-of-way, public property, or private property.

36. All notices between the parties shall be in writing and shall be deemed delivered to the addressee thereof upon receipt, and shall be sent by certified or registered mail, return

receipt requested, postage prepaid, or sent by overnight delivery or facsimile, properly addressed to the parties respectively, as follows:

For notices and communications to MCImetro:

MCImetro Access Transmission Services LLC
Attn: Senior Municipal Affairs Specialist
(VOICE: (972) 729-5587
2400 N. Glenville Drive
Richardson, Texas 75082
Facsimile: (972) 729- 6700

with a copy to:

MCImetro Access Transmission Services LLC
5055 North Point Parkway, 47484/J36
Alpharetta, Georgia 30022
Attn: Managing Attorney – Real Estate and Network Law
Facsimile Number: (678) 259-5139

For notices and communications to the City:

City of Takoma Park
Attn: Telecommunications Administrator
7500 Maple Avenue
Takoma Park, Maryland 20912
Facsimile: (301) 270-8794

Any such communication shall be deemed to have been given when received (or the first business day thereafter if faxed or delivered after business hours, or on a Saturday, Sunday or legal holiday).

37. Authorized Representatives.

(a) For MCImetro. For any matter dealing with construction: Larry Saunders (972-729-5908) is MCImetro's Authorized Representative for this project. For any other matter the Senior Municipal Affairs Specialist Don Hirschenhofer (972-729-7106) is MCImetro's Authorized Representative for this project. MCImetro's Authorized Representatives shall act on behalf of MCImetro on all matters pertaining to this Interim

Agreement. MCImetro's Authorized Representatives shall not be changed without written notice to and the agreement of the City.

(b) For the City. The City Manager shall act as or shall appoint a designee in writing to act as the City Representative in connection with this project. The City Representative shall have authority to: (1) serve as a liaison between the City and MCImetro; (2) give direction to MCImetro to ensure satisfactory and complete performance; (3) monitor and inspect MCImetro's performance to ensure acceptable timeliness and quality; (4) serve as records custodian for this Interim Agreement; (5) accept or reject MCImetro's performance; (6) furnish written notice of MCImetro's performance failures to the City Manager, City Council, and/or City Corporation Counsel, as appropriate; (7) recommend modifications or terminations of the Interim Agreement to the City Manager, City Council, and/or City Corporation Counsel, as appropriate; and (8) issue notices to proceed.

38. MCImetro warrants and represents: that MCImetro in the performance of this Interim Agreement will not violate any laws applicable in the State of Maryland; that MCImetro will in no way engage in or participate in any form of illegal discrimination; and that MCImetro is not now, and will not so long as this Interim Agreement remains in effect, engage in the development, research, testing, evaluation, production, maintenance, storage, transportation, and/or disposal of nuclear weapons or their components, or the sale of merchandise produced by companies so involved.

39. Any dispute arising under this Interim Agreement which is not resolved by an agreement between the parties shall be decided by the City Manager or his/her designee, after reasonable opportunity is provided for all parties to provide written documentation supporting

their position. Pending final resolution of a dispute, except for a termination of this Interim Agreement by the City, MCImetro must proceed diligently with its performance under this Interim Agreement. MCImetro waives any dispute or claim not made in writing and received by the City Manager within one year of the occurrence giving rise to the dispute or claim. A decision by the City Manager or his/her designee under this procedure shall be a condition precedent to a suit being filed by any party.

40. Both parties hereby waive trial by jury in any action on all matters arising out of this Interim Agreement. In the event that suit is filed for the recovery of amounts due under the provisions of this Interim Agreement, or because of the default of MCImetro, and if the City prevails or a default shall be established, MCImetro shall pay to the City all expenses incurred therefore, including reasonable attorney's fees. For purposes of any litigation involving this Interim Agreement, exclusive venue and jurisdiction shall be in the Circuit Court for Montgomery County, Maryland or in the United States District Court for the District of Maryland (Southern Division).

41. If any term, condition or provision of this Interim Agreement shall, to any extent, be held to be contrary to applicable federal or state law or otherwise invalid or unenforceable, the remainder hereof shall be valid in all other respects and continue to be effective. If such a term, condition or provision is material, both parties shall negotiate in good faith to agree upon a substitute term. If the parties are unable to reach agreement on a substitute term, the City may, upon the provision of ten (10) days notice to MCImetro, terminate this Interim Agreement.

42. This Interim Agreement contains the final and entire understanding of the parties with respect to the subject matter contained herein. There are no representations, terms, conditions, statements, warranties, promises, or understandings other than those expressly set

forth or mentioned herein. All modifications and amendments to this Interim Agreement shall be in writing. The failure of the City to enforce any of the terms, conditions or covenants of the Interim Agreement shall not be deemed to be a waiver of a subsequent breach of the terms of this Interim Agreement. This Interim Agreement shall be binding upon the parties, their heirs, successors, and assigns.

43. This Interim Agreement shall be interpreted in accordance with and controlled by the laws and regulations of the State of Maryland and the City of Takoma Park.

44. MCImetro shall indemnify, defend, and hold harmless the City from and against all claims, demands, suits, liabilities, damages, losses, and expenses, including attorneys' fees, resulting from any attempt by any person to recover or rescind payments made pursuant to this Agreement or any preceding agreement relating to the use of the City's rights-of-way by Metropolitan Fiber Systems of Baltimore, Inc., or MCImetro Access Transmission Services LLC.

City of Takoma Park, Maryland

MCImetro Access Transmission
Services LLC

by: _____
Richard M. Finn

by: _____

Title: City Manager

Title: _____

_____, 2004

_____, 2004